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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Image Ten, Inc. Opposer, vs. Rusty Ralph Lemorande, Applicant.	Opposition No. 91233690 Serial No.: 87/090468 OPPOSER'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
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Opposer, Image Ten, Inc. (“Opposer”), by and through its attorneys of record hereby files this motion for summary judgment. Summary judgment should be granted because there is no disputed material fact and Opposer is entitled to judgment as a matter of law.

I. **INTRODUCTION**

Applicant should not be allowed to register the “NIGHT OF THE LIVING DEAD” trademark because (1) Opposer has **undisputed evidence** of more than **forty-nine years (49) of its prior use** of the identical trademark “NIGHT OF THE LIVING DEAD” and (2) Applicant’s proposed trademark is identical to Opposer’s “NIGHT OF THE LIVING DEAD” trademark. **Applicant’s proposed use** and **Opposer actual use** of the trademark are both on the same services and targeting the same consumers, which is likely to cause confusion among consumers. By virtue of Opposer’s rights as the senior user of the NIGHT OF THE LIVING DEAD trademark, Applicant should be denied registration as a matter of law.

II. **SUMMARY OF UNDISPUTED FACTS**

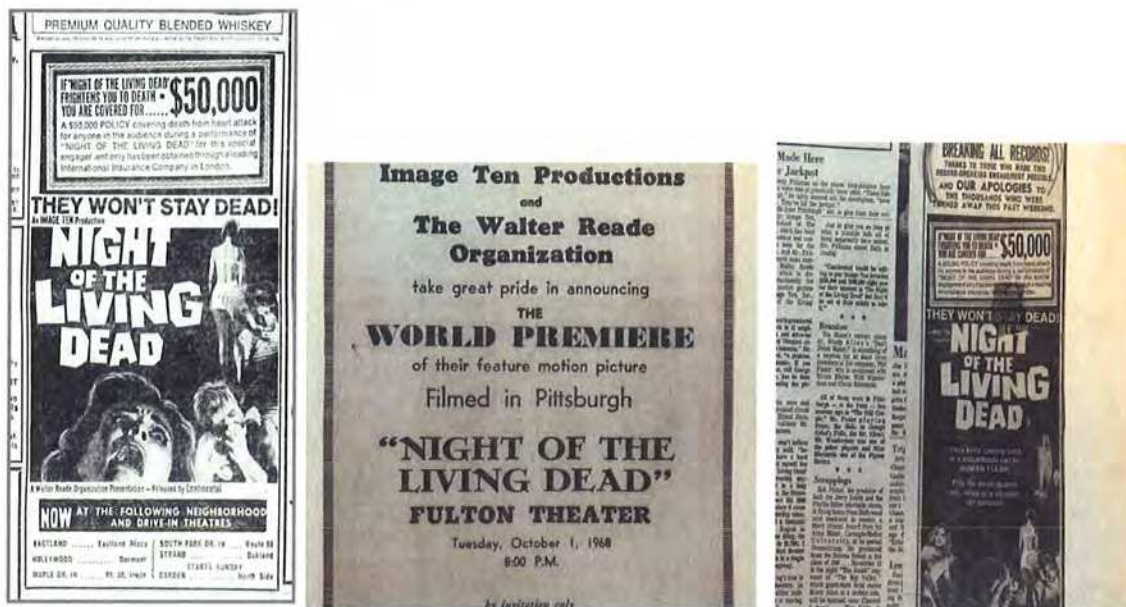
A. OPPOSER FIRST USED THE NIGHT OF THE LIVING DEAD TRADEMARK IN 1968 – FORTY-EIGHT YEARS BEFORE APPLICANT FILED THE APPLICATION

Opposer was the original creator and owner of the NIGHT OF THE LIVING DEAD film, which was released and promoted under the trademark in 1968. The owners of Opposer include the writer, producer, some of the actors, and director of that film. Declaration of Russell Streiner (“Streiner Decl.”), ¶2. Since 1968, Opposer has promoted its NIGHT OF THE LIVING DEAD movie, scripts and other goods and services connected with the movie. Streiner Decl., ¶3.

Opposer’s film NIGHT OF THE LIVING DEAD is an iconic film celebrated by its many

fans at various conventions throughout the United States, many of which have been repeated annually for decades. At these conventions and at screenings as well as other events, Opposer has sold memorabilia annually since at least as early as 1972. Opposer's NIGHT OF THE LIVING DEAD trademark was registered on September 22, 2009 for "t-shirts; action figures and accessories therefor," but did not file for its NIGHT OF THE LIVING DEAD mark in connection with motion pictures until January 30, 2017. Streiner Decl., ¶4.

Since 1968, Opposer has used the NIGHT OF THE LIVING DEAD trademark in connection with the motion picture that it produced. Streiner Decl., ¶2. Examples of such use of the trademark by Image Ten are below –





Streiner Decl. ¶3.

Opposer uses the NIGHT OF THE LIVING DEAD trademark in conjunction with its original 1968 motion picture. The original motion picture was directed by the late George A. Romero, with a screenplay written by John Russo and George Romero, and co-produced by Russ Streiner and the late Karl Hardman -- all of whom are among the owners of Opposer. Streiner Decl., ¶6. The film gained great financial success and has become an American classic film now a part of the Museum of Modern Art permanent collection. Streiner Decl., ¶7. Request for Judicial Notice (“RJN”), Exhibit A. In 1999, the Library of Congress added the film to the National Film Registry and deemed it “culturally, historically or aesthetically significant,” and in 2001, the American Film Institute included the movie in a list of America’s most heart-pounding movies.” Streiner Decl., ¶7. RJN, Ex. A.

Not only has Opposer been using the NIGHT OF THE LIVING DEAD trademark in connection with its motion picture, but it also uses the mark in connection with promotional and other items related to the motion picture. Because of the notoriety of the mark, there is a demand for licensing in connection with other goods and services to promote the motion picture. For instance, the NIGHT OF THE LIVING DEAD mark has been licensed by Opposer to third

parties for use in connection with t-shirts, action figures and other goods. Streiner Decl., ¶8. Moreover, the trademark is used in connection with the motion pictures, posters, photographs, electronic art and media, and other items some of which are signed and/or sold at trade shows and other venues. Streiner Decl., ¶9.

Opposer's trademark NIGHT OF THE LIVING DEAD is very well-known throughout the United States and the world and is used to identify Opposer, the original source of the film, which is comprised of the writers, producers, directors, and actors who appeared in the movie. Streiner Decl., ¶10. Opposer intends to continue using its NIGHT OF THE LIVING DEAD trademark to advertise and sell its original motion picture as well as an upcoming 50th Anniversary Release of a newly-copyrighted 4k version of the film along with documentaries and new electronic media. In addition, Opposer will continue to sell and license related promotional and other items for many years to come. Streiner Decl., ¶11.

B. APPLICANT ATTEMPTS TO REGISTER 'NIGHT OF THE LIVING DEAD' FORTY-EIGHT YEARS AFTER OPPOSER WAS ALREADY USING THE 'NIGHT OF THE LIVING DEAD' TRADEMARK

On June 30, 2016, **forty-eight (48) years after** Opposer began using the NIGHT OF THE LIVING DEAD trademark, Applicant filed an "intent to use" application to register Applicant's proposed trademark NIGHT OF THE LIVING DEAD. "RJN", Ex. B. The application is for use in Class 41, specifically "motion picture film production." RJN, Ex. B. Applicant has not actually begun use of the NIGHT OF THE LIVING DEAD trademark. Bhatti Decl., Ex. 1 (Applicant's Response to Interrogatory No. 1).

III.
SUMMARY JUDGMENT SHOULD BE GRANTED
HOLDING THAT OPPOSER HAS PRIOR RIGHTS IN THE
NIGHT OF THE LIVING DEAD TRADEMARK AND THE
APPLICATION SHOULD BE DENIED

A. SUMMARY JUDGMENT STANDARD

Fed.R.Civ.P 56 authorizes summary judgment or partial summary judgment on a claim for relief or on part of a claim for relief or defense. *See also, Allstate Ins. Co. v. Madan*, 889 F.Supp. 374, 378-379 (C.D.Cal 1995). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. If the moving party meets its initial burden, the nonmoving party must then set forth, by affidavit or as otherwise provided in Rule 56, “specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

B. OPPOSER HAS THE RIGHT TO PREVENT APPLICANT’S
REGISTRATION OF THE NIGHT OF THE LIVING DEAD MARK DUE
TO OPPOSER’S USE OF THE IDENTICAL MARK ON THE SAME
TYPES OF SERVICES

Section 2(d) of the Lanham Act precludes registration when a mark is likely to cause confusion with a mark or trade name previously used by another. 15 U.S.C. §1052(d). In order to prevail on a Section 2(d) claim, an opposer must establish they have priority in a proprietary term and that registration of the applicant’s mark will create a likelihood of confusion. *Herbko International Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1162 (Fed. Cir. 2002); *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 1402 (CCPA 1974).

1. Opposer Has Standing to Object to Registration

Standing is a threshold issue that must be proven in every inter partes case. *Lipton Industries Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1028 (CCPA 1982). In order to meet the standing requirement, a plaintiff need only show that it has a real interest, i.e., a personal stake,

in the outcome of the proceeding. *See Ritchie v. Simpson*, 170 F.3d 1092, 1095 (Fed. Cir. 1999); *Jewelers Vigilance Committee, Inc. v. Ullenberg Corp.*, 823 F.2d 490, 492-493 (Fed. Cir. 1987).

Opposer has used the NIGHT OF THE LIVING DEAD trademark continuously since 1968. Streiner Decl., ¶4. Opposer will be harmed if Applicant is permitted to register NIGHT OF THE LIVING DEAD as a trademark because it is identical to Opposer's trademark. Opposer's use of the NIGHT OF THE LIVING DEAD trademark has always been in reference to the 1968 movie and related memorabilia and new media in relation to the 1968 movie. Moreover, Opposer's and Applicant's services are identical and are directed to the same consumers. Bhatti Decl. Ex. 1 (Applicant's Response to Interrogatories Nos. 3 and 8); Streiner Decl., ¶4. Applicant's proposed use of Opposer's trademark would cause consumers to affiliate Applicant's proposed production company with Applicant, because both involve the film industry. Accordingly, Opposer has standing to assert a Section 2(d) claim.

2. Opposer Used the NIGHT OF THE LIVING DEAD Trademark Continuously For Over Forty-Eight Years Prior to Applicant's Filing of an Intent to Use Application

A party may establish its own prior proprietary rights in a mark through actual or technical trademark use or by use analogous to trademark use. *Westrex Corp. v. New Sensor Corp.*, 83 USPQ2d 1215 (TTAB 2007); *Automedx Inc. v. Artivent Corp.*, 95 USPQ2d 1976, 1978 (TTAB 2010). "The term 'use in commerce' means the bona fide use of a mark in the ordinary course of trade ..." 15 U.S.C. §1127. The "use in commerce" requirement is met when used in connection with services "when it is used or displayed in the sale or advertising and the services are rendered in commerce, or the services are rendered in more than one State or in the United States and a foreign country and the person rendering the services is engaged in commerce in connection with the services." *Aycock Engineering, Inc. v. Airflite*,

Inc., 560 F.2d 1350, 90 USPQ2d 1301, 1305 (Fed. Cir. 2009); *White v. Paramount Pictures Corporation*, 31 USPQ2d 1768, 1772 (TTAB 1994), *aff'd*, 108 F.3d 1392 (Fed. Cir. 1997).

The title of a literary work is entitled to protection when such title has acquired secondary meaning. *Application of Cooper*, 45 CCPA 923, 254 F.2d 611, 117 USPQ 396 (1958). Secondary meaning is acquired when a mark is used continuously and exclusively used for five years before the date on which the claim of distinctiveness is made. TMEP §1212. With secondary meaning, the title of the works is protectable, as noted in *Rogers v. Grimaldi*, 875 F.2d 994, 10 USPQ2d 1825 (2d Cir. 1989):

The purchaser of a book, like the purchaser of a can of peas, has a right not to be misled as to the source of the product. Thus, it is well established that where the title of a movie or a book has acquired secondary meaning – that is, where the title is sufficiently well known that consumers associate it with a particular author's work – the holder of rights to that title may prevent the use of the mark or confusingly similar titles by other authors.

According to McCarthy, use of a “literary title” refers to use of a title in a periodical, newspaper, book, play, motion picture, television series etc. McCarthy §10:1. Per McCarthy:

such titles are protected according to the fundamental tenets of trademark and unfair competition law. That is, such titles cannot be used by a junior user in such a way as to create a likelihood of confusion of source, affiliation, sponsorship or connection in the minds of potential buyers. For these purposes, titles of literary and entertainment creations and works are treated in much the same way as the trademarks of other commercial commodities.

Id. Opposer's NIGHT OF THE LIVING DEAD mark has been used in commerce as the title of a literary work (and later along with other merchandise) since 1968. Such use of the mark clearly shows that the mark has acquired secondary meaning and is entitled to

protection as consumers view Opposer as the source of any goods and services that are used with the NIGHT OF THE LIVING DEAD mark. *Sugar Busters LLC v. Brennan*, 177 F.3d 258, 50 USPQ2d 1821 (5th Cir. 1999).

Applicant filed his application for registration of the NIGHT OF THE LIVING DEAD trademark on June 30, 2016, as an “intent to use” application. RJN, Ex. B. Applicant has stated that he has not yet used the trademark. Bhatti Decl., Ex. 1 (Applicant’s Response to Interrogatory No. 1).

Opposer used the NIGHT OF THE LIVING DEAD trademark beginning in 1968. Streiner Decl., ¶2. Opposer has continuously used the NIGHT OF THE LIVING DEAD trademark from 1968 to the present in connection with motion picture films, t-shirts, action figures, posters and many other items and service. The undisputed evidence establishing this prior use of the NIGHT OF THE LIVING DEAD trademark includes:

(a) The newspaper advertisements for the film when it was first released. Streiner Declaration ¶10

(b) Sale of DVDs and other re-releases of the film. Streiner Declaration ¶10

(c) Licensed merchandise. Streiner Declaration ¶¶ 4 and 8.

(d) Recognition of significance of film by American Film Institute and Museum of Modern Art. Streiner Declaration ¶7

The foregoing evidence establishes Opposer’s prior use of the NIGHT OF THE LIVING DEAD trademark for over forty-eight (48) years before Applicant even filed his “intent to use” application for NIGHT OF THE LIVING DEAD.

[illegible]

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As set forth above, Opposer has established that it has used the NIGHT OF THE LIVING DEAD trademark since 1968, which is forty-eight (48) years before Applicant sought to register or use the NIGHT OF THE LIVING DEAD trademark. Moreover, Opposer has established that its use of NIGHT OF THE LIVING DEAD was a trademark use.

3. Opposer's NIGHT OF THE LIVING DEAD Mark is Inherently Distinctive

“Marks” are generally classified in one of five categories of increasing distinctiveness: (1) generic, (2) descriptive, (3) suggestive, (4) arbitrary, or (5) fanciful.” *Zobmondo Entm't, LLC v. Falls Media, LLC*, 602 F.3d 1108, 1113 (9th Cir. 2010) (citing *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992)). “Suggestive, arbitrary, and fanciful marks are considered ‘inherently distinctive’ and are automatically entitled to federal trademark protection because ‘their intrinsic nature serves to identify a particular source of a product.’” *Zobmondo*, 602 F.3d at 1113. Generic terms are not protectable. *Rodeo Collection, Ltd. v. West Seventh*, 812 F.2d 1215, 1218 (9th Cir. 1987). A mark is descriptive only if it describes the products features. *Kendall-Jackson Winery, Ltd. v. E.J. Gallo Winery*, 150 F.3d 1042, 1047 fn.8 (9th Cir. 1993).

NIGHT OF THE LIVING DEAD is not a generic term for anything. NIGHT OF THE LIVING DEAD does not describe any features of the goods t-shirts, action figures, etc., nor does it describe motion picture film production services. Instead, George Romero, one of the creators of the NIGHT OF THE LIVING DEAD original motion picture is hailed as the “father of the modern movie zombie and the inspiration for generations of horror filmmakers.” RJN, Ex. A. NIGHT OF THE LIVING DEAD paved the way for other zombie movies and has been an inspiration for filmmakers who have emulated the movie and its genre in their own films. The movie has gained a cult following and has gained notoriety such that consumers are well aware of the NIGHT OF THE LIVING DEAD film and the association of the same to Opposer. The

term NIGHT OF THE LIVING DEAD in no way describes the nature of any particular goods or services.

Similarly, NIGHT OF THE LIVING DEAD does not suggest any attribute of the goods or services. A person hearing the brand NIGHT OF THE LIVING DEAD without explanation will never reach the conclusion that the mark refers to anything other than the original motion picture. As such, it is clear that the mark is an arbitrary or fanciful mark. Since the mark is inherently distinctive, there is no need to determine which category NIGHT OF THE LIVING DEAD ultimately falls into. Accordingly, the NIGHT OF THE LIVING DEAD mark is inherently distinctive and there is no need to present evidence of secondary meaning. Opposer is entitled to trademark protection for the NIGHT OF THE LIVING DEAD mark. *Zobmondo*, 602 F.3d at 1113.

4. The PTO Should Not Register Applicant's NIGHT OF THE LIVING DEAD Trademark as it is Likely to Cause Confusion with Opposer's NIGHT OF THE LIVING DEAD Trademark

In testing for likelihood of confusion 15 U.S.C. §1052(d), the following, when of record, must be considered: (1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression; (2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use; (3) The similarity or dissimilarity of established, likely-to-continue trade channels; (4) The conditions under which and buyers to whom sales are made, i.e. “impulse” vs. careful, sophisticated purchasing; (5) The fame of the prior mark (sales, advertising, length of use); (6) The number and nature of similar marks in use on similar goods; (7) The nature and extent of actual confusion; (8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion; (9) The variety of goods on which a mark is or is not used; (10) The market interface between applicant and the

owner of a prior mark; (11) The extent to which applicant has a right to exclude others from use of its mark on its goods; (12) The extent of potential confusion, i.e., whether *de minimis* or substantial; (13) Any other established fact probative of the effect of use. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ563 (CCPA 1973).

The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *Baseball America Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844, 1848 (TTAB 2004). *See also Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973); *Johann Maria Farina Gegnuber Dem Julichs-Platz v. Chesebrough-Pond, Inc.*, 471 F.2d 1385, 176 USPQ 199, 200 (CCPA 1972).

First, the marks are identical. As such, they are impossible to distinguish. This factor weighs in favor of Opposer.

Second, Opposer's types of goods and common law rights in the mark in connection with the original motion picture film are virtually identical and are related to those set forth in Applicant's application. Opposer's goods and services include t-shirts, action figures and other goods, as well as the original motion picture film and related services. Streiner Decl., ¶3. Applicant's application lists an "intent to use" the NIGHT OF THE LIVING DEAD mark in connection with motion picture film production. RJN, Ex B. Opposer and Applicant are using the mark (or in Applicant's case, intending to use the mark) in connection with the same types of services – motion picture film production, motion pictures, and related goods and services.

Streiner Decl., ¶¶4, 4, Bhatti Decl. (Applicant's Response to Interrogatory Nos. 3, 4, 8). This factor favors Opposer.

Third, Opposer and Applicant are both selling to the same consumers – fans and followers of the NIGHT OF THE LIVING DEAD movie. Streiner Decl., ¶13; Bhatti Dec. (Applicant's Response to Interrogatory Nos. 3, 4, 8). Applicant specifically states in his interrogatory responses that he has a “desire to create a work or works based on concepts derived from the old public domain film.” Both parties will be selling their products in the same venues, releasing their films through the same or similar distribution channels, and will be targeting the same end user. Streiner Decl., ¶¶4, 5, 9, Bhatti Decl. (Applicant's Response to Interrogatory No. 3, 4, 8). Both parties will market and sell their products and services through the Internet – further increasing likelihood of confusion among people searching for NIGHT OF THE LIVING DEAD and instead finding Applicant. Streiner Decl. ¶9; Bhatti Decl. (Applicant's Response to Interrogatory Nos.3, 4). This factor favors Opposer.

Fourth, the motion picture film production services provided by both parties refer to a motion picture released under the name NIGHT OF THE LIVING DEAD. Such movies are either shown in a theater, available for purchase, or available to be streamed online or viewable through a broadcast channel. A movie ticket, purchase of the film, streaming or other manner in which to view the film is generally inexpensive, usually \$30 or less. Streiner Decl., ¶13 At that price point, it is unlikely that purchasers will scrutinize whether they are buying authentic NIGHT OF THE LIVING DEAD merchandise or films versus something sold by Applicant as NIGHT OF THE LIVING DEAD. This factor favors Opposer.

Fifth, Opposer's NIGHT OF THE LIVING DEAD film was released in 1968 and has been in continuous use for the last forty-nine years in connection not only with the film, but with

merchandise and other promotional materials affiliated with the same. NIGHT OF THE LIVING DEAD is a well-known mark, which has been developed over the last 49 years and has gained fame and notoriety amongst the general public and consumers. The exclusive right to use NIGHT OF THE LIVING DEAD belongs to Opposer and such use without confusion is essential. This factor favors Opposer.

Sixth, Opposer is not aware of similar marks used by others for applicant's goods which have been approved, except for applicant. As a result, Opposer enjoyed the exclusive ability to sell its products and services using its unique NIGHT OF THE LIVING DEAD trademark until Applicant decided to cause confusion by filing for a virtually identical mark.

Seventh and **Eighth**, actual confusion is likely to occur. The marks **are identical**. The services are the same and are targeted to the same consumers. Indeed, there will be instances of actual confusion once Applicant commences use of the mark, which is the real reason that Applicant filed for such mark – in order to profit from the goodwill built up by Opposer in the mark.

Ninth, Applicant has stated that he intends to use the mark in connection with “filmed (now digital) entertainment, to be marketed and distributed to all consumers of filmed (digital entertainment).” Bhatti Decl., (Applicant's Response to Interrogatory No. 3). Moreover, Applicant states that it will create a work or works based on concepts derived from the original NIGHT OF THE LIVING DEAD film. Bhatti Decl. (Applicant's Response to Interrogatory No. 4). Applicant clearly states that it will use the NIGHT OF THE LIVING DEAD in connection with identical services and goods. This factor favors Opposer.

Tenth, there is no interface between Applicant and Opposer that would justify Applicant's use of a confusingly similar mark. Opposer used the NIGHT OF THE LIVING

DEAD mark for forty-eight (48) years before Applicant filed its intent to use application. Opposer immediately objected to Applicant's application for the NIGHT OF THE LIVING DEAD trademark when Opposer became aware of the same. Bhatti Decl. There is no basis for allowing Applicant to use a confusingly similar mark to Opposer's NIGHT OF THE LIVING DEAD mark.

Eleventh, Opposer's NIGHT OF THE LIVING DEAD mark is either arbitrary or fanciful. Both of these categories are entitled to the highest level of trademark protection. Accordingly, this factor favors Opposer.

Finally, the potential confusion is substantial. Both Opposer and Applicant are targeting the same consumers, those who are looking for filmed or digital entertainment, as well as products and services related to the same. The services included in Applicant's application are exactly the same as those already being promoted by Opposer. Applicant and Opposer would be advertising and selling their products and services to the same consumers, as evidenced by Applicant's interrogatory responses. Bhatti Decl., (Applicant's Responses to Interrogatories Nos. 3 and 4). There simply is no room in this category of customers for two **identical** trademarks.

There is a strong likelihood of confusion between Opposer's NIGHT OF THE LIVING DEAD and Applicant's identical mark. The marks are identical, target the same consumers, and there is no reason for consumers to understand that these two identical trademarks emanate from two (2) different sources.

IV. **CONCLUSION**

The PTO cannot register a trademark that is likely to cause confusion with a preexisting trademark. Here, Opposer has shown that it had a preexisting trademark use of the NIGHT OF

THE LIVING DEAD trademark. Opposer has established that its NIGHT OF THE LIVING DEAD trademark is inherently distinctive. Finally, Opposer has demonstrated that Applicant's NIGHT OF THE LIVING DEAD trademark is likely to cause confusion with Opposer's preexisting NIGHT OF THE LIVING DEAD trademark. Accordingly, the Application to register NIGHT OF THE LIVING DEAD should be denied.

Dated: March 27, 2018

Respectfully Submitted,

IMAGE TEN, INC.

By: /fbhatti/

Michael L. Meeks, Esq.
Farah P. Bhatti, Esq.
Attorneys for Opposer
Buchalter, a Professional Corporation
18400 Von Karman Ave., Suite 800
Irvine, CA 92612
Phone: 949.224.6291
Email: mmeeks@buchalter.com
fbhatti@buchalter.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent to attorneys for Opposer this 27th day of March, 2018, via email to the following:

Lemorande@gmail.com

/fbhatti/

Farah P. Bhatti

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Image Ten, Inc.		
	Opposer,	Opposition No. 91233690 Application Serial No. 87/090468
vs.		
Rusty Ralph Lemorande,	Applicant.	DECLARATION OF RUSSELL STREINER IN SUPPORT OF OPPOSER'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I, Russell Streiner, declare:

1. I have personal knowledge of the facts set forth herein and, if called upon, would competently testify thereto under oath.

2. In 1968, I, along with others that comprise Image Ten, Inc., (referred to hereinafter as "Opposer"), produced, released and promoted a motion picture film under the name NIGHT OF THE LIVING DEAD. All rights in the NIGHT OF THE LIVING DEAD trademark belong to Image Ten, Inc.

3. Examples of use of Image Ten's NIGHT OF THE LIVING DEAD trademark from 1968 are included in the Motion for Summary Judgment.

4. Opposer has used the NIGHT OF THE LIVING DEAD trademark not only in connection with the production, release and promotion of the motion picture film, but also in connection with scripts, promotional merchandise such as t-shirts, action figures and other items since the film was first released. Examples of such use are hereto attached as **Exhibit A.**

Opposer has continuously used the mark since 2009.

5. In 2009, at the direction of and on behalf of Opposer, Spherewerx registered the NIGHT OF THE LIVING DEAD trademark to protect certain promotional items that were being used in connection with the NIGHT OF THE LIVING DEAD mark. The mark was registered on September 22, 2009. An application for NIGHT OF THE LIVING DEAD in connection with motion pictures was filed by Opposer on January 30, 2017.

6. The original motion picture NIGHT OF THE LIVING DEAD was directed by George A. Romero. The screenplay was written by John Russo and George Romero and the film was co-produced by Russ Streiner and Karl Hardman. John Russ, George Romero, Russ Streiner and Karl Hardman were all owners of Image Ten, Inc. The film achieved great financial success and is now considered a cult classic with a loyal following.

7. In 1999, the Library of Congress stated that the film was “culturally, historically or aesthetically significant,” and in 2001, the American Film Institute included NIGHT OF THE LIVING DEAD in a list of “America’s most heart-pounding movies.” The film is also a part of the Museum of Modern Art’s permanent collection.

8. Opposer has entered into licensing agreements with third parties to promote goods and services under the NIGHT OF THE LIVING DEAD mark, including use on t-shirts, action figures and other products. Examples of some clothing items are attached as **Exhibit A.**

9. Opposer has also used the NIGHT OF THE LIVING DEAD mark in connection with pictures, posters, photographs and other memorabilia and items which are often sold at trade shows and are signed by members of Image Ten, Inc. who were also involved in or starred in the film. Examples of such goods are hereto attached as **Exhibit B.** Opposer uses its marks not only

at trade shows, but also through other distribution channels and also advertises its goods and services via the Internet.

10. NIGHT OF THE LIVING DEAD was used in connection with the original release of the film as well as authorized re-releases over the years. Examples of advertisements for the film as well as DVD and movie covers are hereto attached as **Exhibit C**.

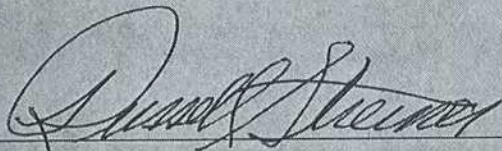
11. NIGHT OF THE LIVING DEAD has become a very well-known mark not only in the United States but throughout the entire world. Opposer is known as not only the source of the film but also as the source of all authorized related goods and services which use the NIGHT OF THE LIVING DEAD mark. The mark is used to identify Opposer, who is the original source of the film and the rightful owner of the mark. Opposer is comprised of the producers, directors and some of the actors that appeared in the original film.

12. With the upcoming 50th anniversary release of the film, Opposer has every intention of continuing to use the NIGHT OF THE LIVING DEAD trademark in connection with the advertisement and sale not only of the original film, but also in connection with other related goods and services, as well as promotional and other items for many years.

13. Opposer intends to re-screen the original NIGHT OF THE LIVING DEAD motion picture in a variety of theaters in honor of the film's 50th anniversary. Moreover, Opposer intends to release a re-mastered version of the original film on DVD as well as other digital means. Opposer notes that the cost to either view the film in a theater, or purchase a DVD or electronic copy of the same would be less than \$30.

14. Opposer was concerned about Applicant's mark as with the nearing of the upcoming 50th anniversary of the film, several third parties are trying to infringe on Applicant's rights and produce unauthorized materials in order to profit from the goodwill associated with the trademark and Image Ten's efforts. Applicant's filing of an application for motion picture film production services clearly shows Applicant's intent to market its services to the same consumers to whom Image Ten markets its goods and services.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 23 day of March, 2018.



Russell Streiner

EXHIBIT A

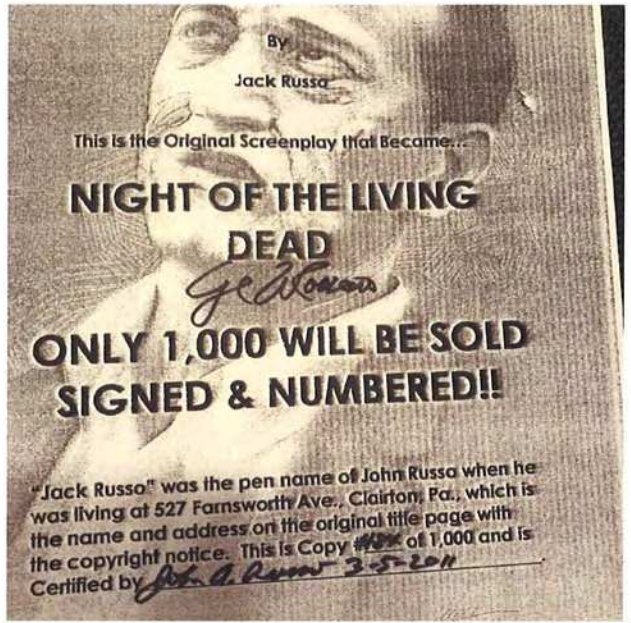
Licensed Shirts:





EXHIBIT B

Signed Screenplays:

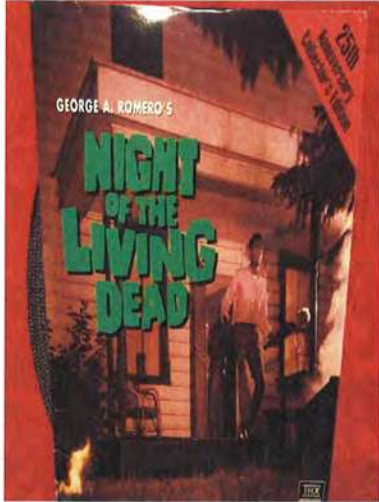


Mini-Posters



EXHIBIT C

25th Anniversary Laser Disk – Authorized Release (circa 1993)



Current Blu-Ray Cover (circa 2018):

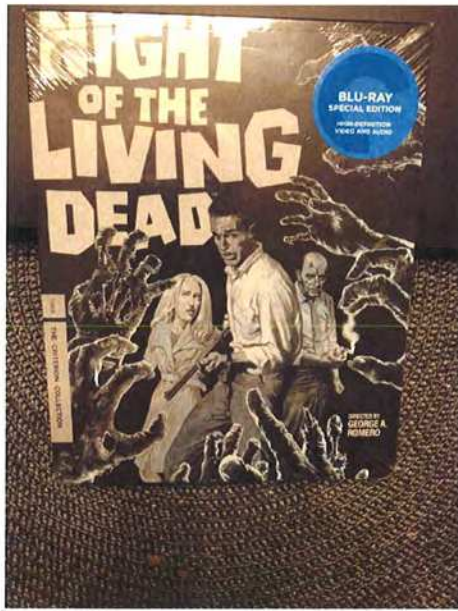
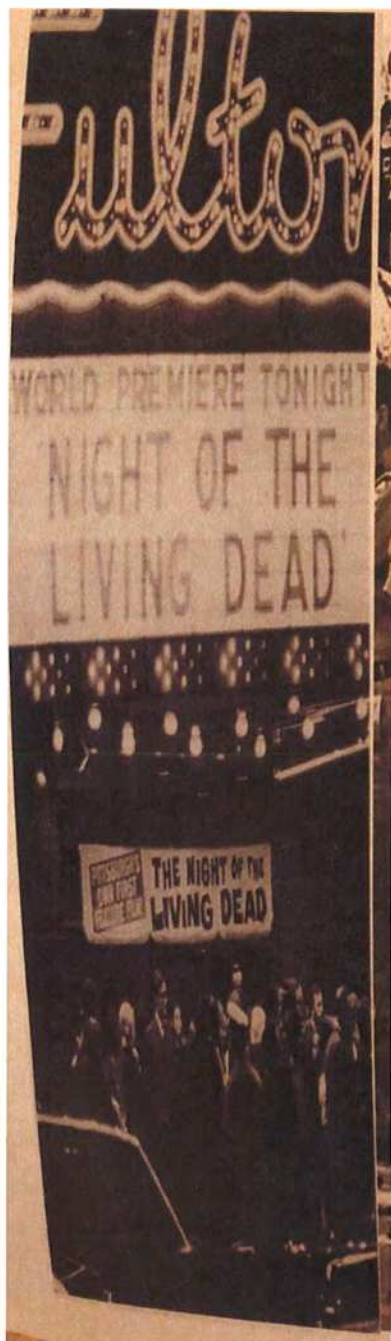


Photo from Premier of Movie (circa Oct. 1, 1968):



own him!"

Music by Clark Gable Soundtrack Sheppard Strachwick Nancy Coleman Julius Horst David Huddleston Eve Jessye Barbara Ann Teer
Janet Healy Althea King Robert Nye Hilary Swank Young Albert Thurman John Franken And Thomas John Torgler Holmes / Managers

PLUS

COLOR by Moviola

Both Continental & Re-release

"MORE TERRIFYING THAN HITCHCOCK'S 'PSYCHO'"

— Marie Torre, PDCA TV, Pittsburgh

An IMAGE TEN Production

**NIGHT
OF THE
LIVING
DEAD**

STARRING

JUDITH O'DEA **DIANE JONES** **MARILYN EASTMAN** **KARL HARDMAN** **JUDITH RIDLEY** **KEITH WAYNE**

Produced by Ronald W. Steinhilber and Karl Hardman - Directed by George A. Romero - Screenplay by John A. Russo

Starts TODAY at RKO and OTHER SELECT THEATRES!

MANHATTAN

RKO COLISEUM
RKO 23rd ST. CINEMA
BRONX'S BEACON
5-WAY & 10th
BRONX'S LYRIC 42nd ST.
BEET, WRAY & BIR AVE.

BRONX

RKO FORDHAM

BROOKLYN

RKO ALBEE
RKO DYKER
RKO KENMORE
RKO MADISON
QUEENS

RKO ALDEN
JAMAICA

RKO KEITH'S
FLUSHING

NASSAU

RKO TWIN
LAWRENCE
RKO TWIN
ROCKVILLE CENTRE
USE
RKO ISLAND
RETHPAGE

USE
PEQUA MASSAPEQUA
FOR EASTERN'S
RACEWAY
CINEMA WESTBURY
FOR EASTERN'S
TOWN
GLEN COVE

SUFFOLK

RKO TWIN
BAYLON
GREAT SOUTH BAY
RKO TWIN
COMMACK
WESTCHESTER

RKO KEITH'S
WHITE PLAINS
RKO
PROCTOR'S
YONKERS

UPSTATE N. Y.

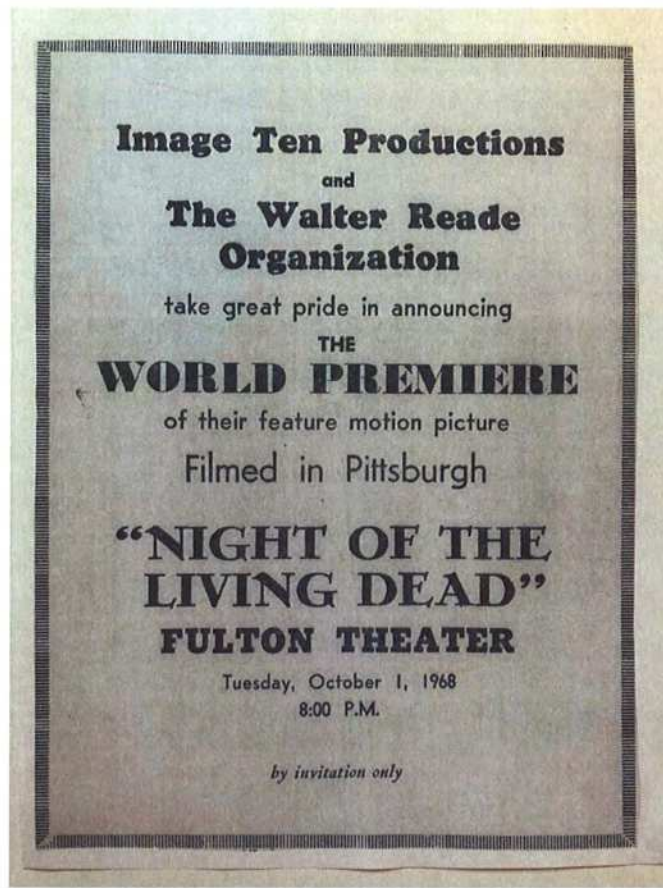
FLORISS
COLONIAL
POUGHKEEPSIE
USE
ROCKLAND
SHRIVE-IN
WADSWORTH

NEW JERSEY

NEW JERSEY RUMER'S
FABIAN
PATERSON
RKO STATE
NEW BRUNSWICK

[illegible]

Announcement and Invitation to Movie Premier (circa 1968)



Newspaper Advertisement for Promoting Movie (circa 1968)

PREMIUM QUALITY BLENDED WHISKEY

IF "NIGHT OF THE LIVING DEAD" FRIGHTENS YOU TO DEATH - YOU ARE COVERED FOR..... **\$50,000**

A \$50,000 POLICY covering death from heart attack for anyone in the audience during a performance of "NIGHT OF THE LIVING DEAD" for this special engagement only has been obtained through a leading International Insurance Company in London.

THEY WON'T STAY DEAD!

An IMAGE TEN Production

NIGHT OF THE LIVING DEAD

A Walter Reade Organization Presentation - Released by Continental

NOW AT THE FOLLOWING NEIGHBORHOOD AND DRIVE-IN THEATRES

EASTLAND	Eastland Plaza	SOUTH PARK DR. IN	Route 88
HOLLYWOOD	Dormant	STRAND	Oakland
MAPLE DR. IN	Rt. 30, Irwin	CARDEN	Starts Sunday North Side

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Image Ten, Inc.		
	Opposer,	Opposition No. 91233690 Application Serial No. 87/090468
vs.		
Rusty Ralph Lemorande,	Applicant.	DECLARATION OF FARAH BHATTI IN SUPPORT OF OPPOSER'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I, Farah Bhatti, declare:

1. I have personal knowledge of the facts set forth herein, and if called upon, would competently testify thereto under oath. I am counsel to Image Ten, Inc. in the above-entitled matter.

2. A true and correct copy of Applicant Rusty Ralph Lemorande's responses to Opposer's First Set of Interrogatories is attached hereto as Exhibit 1.

3. Opposer instructed me to prepare and file a Notice of Opposition against Applicant Rusty Ralph Lemorande's application when the opposition period opened.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 27th day of March, 2018.



EXHIBIT 1

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Image Ten, Inc. <div style="text-align: center;">Opposer,</div> vs. Rusty Ralph Lemorande, <div style="text-align: center;">Applicant.</div>	Opposition No. 91233690 Serial No.: 87/090468 Mark: NIGHT OF THE LIVING DEAD
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**OPPOSER'S FIRST SET OF INTERROGATORIES TO APPLICANT
RUSTY RALPH LEMORANDE**

PROPOUNDING PARTY: Opposer Image Ten, Inc.
RESPONDING PARTY: Applicant Rusty Ralph Lemorande
SET NUMBER: One

Pursuant to the provisions of Rule 33 of the Federal Rules of Civil Procedure, and Rules 2.116 and 2.120 of the Trademark Rules of Practice, Opposer Image Ten, Inc. ("Opposer") hereby requests that Applicant Rusty Ralph Lemorande ("Applicant") answer the interrogatories set forth below separately and fully in writing and under oath. The requested discovery should be served within 30 days of the date of services in accordance with Trademark Rules 2.119 and 2.120.

INSTRUCTIONS AND DEFINITIONS OF TERMS

A. As used herein, the term “Applicant” refers to Rusty Ralph Lemorande and includes all affiliates, subsidiaries, partners, employees, agents, staff members, and representatives, who work with Rusty Ralph Lemorande in the use of the trademark NIGHT OF THE LIVING DEAD and also includes counsel for Rusty Ralph Lemorande as well as any other person action on Rusty Ralph Lemorande’s behalf, pursuant to their authority or subject to their control.

B. The term “Opposer” refers to Image Ten, Inc. and includes all principals, officers, directors, trustees, employees, staff members, agents and representatives.

C. “AND” or “OR” are to be construed disjunctively or conjunctively as necessary to bring within the scope of the request all responses which might otherwise be construed to be outside its scope.

D. “BUSINESS” means any trade, commerce, purchase or sale of goods, negotiation, contractual relations, marketing and advertising activities, project, work, employment, and solicitation of any of the foregoing.

E. Where Applicant is asked to IDENTIFY documents, the documents should be identified by stating:

1. The general type of document, i.e., letter, memorandum, report, miscellaneous, notes, etc.;
2. Date;
3. Author;
4. Organization, if any, with which author was connected;
5. Addressee or recipient;
6. Other distributees;

7. Organization, if any, with which addressee or recipient, or distributees were connected;
8. General nature of the subject matter to the extent that Petitioner can do so without divulging matter considered by it to be privileged;
9. Present location of the document and each copy thereof known to Petitioner, including the title, index number and location, if any, of the file in which the document is kept by the Petitioner or the file from which said document was removed, if removed for the purposes of this case, and the identity of all persons responsible for the filing or other disposition of the document.

F. Where Applicant is asked to IDENTIFY PERSONS, the person should be identified by stating:

1. Their full name, home and business addresses, if known;
2. Their employment, job title or description; and
3. If employed by Petitioner, their dates and regular places of employment, title and general duties.

G. Where Applicant is asked to IDENTIFY companies or the response to an interrogatory would require the identification of a company, that the company should be identified by stating:

1. Its full corporate name;
2. A brief description of the general nature of its business;
3. Its state of incorporation;
4. The address and principal place of business; and
5. The identity of the officers or other persons who have knowledge of the matter with respect to which the company has been identified.

H. “DOCUMENTS” or “ALL DOCUMENTS” means all records, writings, and materials available to YOU and further to include, without limitation, any written, recorded, graphic, or printed matter, in whatever form, whether printed and/or produced by hand or any other process, specifically including (1) all originals, copies or drafts, and (2) originals, copies or drafts on which appear any notes or writings placed thereon after the document was first printed, typed, recorded, or made into graphic matter, however produced or reproduced, in YOUR actual or constructive possession, including, without limitation, any letters, telegrams, memoranda, writings, circulars, monograph, bulletins, manuals, speeches, audio and video tapes, drawings, blueprints, recordings, computer discs or tapes, computer electronic or optical memory devices in readable form, computer printouts, computer electronic messages, notes, correspondence, communications of any nature, summaries of records of conversations or conferences, information which can be retrieved by any process, test and/or analysis, reports and data sheets, specifications, sketches, minutes or reports and/or summaries or interviews, reports and/or summaries of investigations, opinions or reports of consultants or consulting engineers, agreements and contracts, brochures, pamphlets, advertisements, letters to the trade, and including any tangible things within the scope of Rule 34(a)(1), Federal Rules of Civil Procedure.

I. The word “INCLUDING” shall be construed to mean “including, but not limited to” to bring within the scope of the request all responses which might otherwise be construed to be outside its scope.

J. “PERSON” and “PERSONS” means any natural person, firm, association, organization, partnership, business, trust, corporation or public entity.

K. “RELATING TO,” “RELATES TO,” or “RELATED TO” means anything that constitutes, contains, evidences, embodies, comprises, reflects, identifies, states, refers to, deals with, comments on, responds to, describes,

analyzes, or is in any way relevant to that subject, INCLUDING without limitation, COMMUNICATIONS or DOCUMENTS concerning the matter inquired about or the existence of other COMMUNICATIONS or DOCUMENTS RELATING TO such matter.

L. “YOU,” “YOUR,” “YOURS” means Applicant, its agents, employees, affiliates, attorneys, accountants, investigators, representatives, insurance companies, their agents, their employees, and any other person acting on your behalf.

M. In the event YOU wish to assert either attorney-client privilege or work-product doctrine, or both, as to any document for which identification is requested by any of the following specific requests, then as to each document subject to the assertion, YOU are to provide: the nature of the document, the sender, the author, the recipient, the recipient of each copy, the date, the name of each person to whom the original or any copy was circulated, the names appearing on any circulation list associated with the document, a summary statement of the subject matter(s) of the document in sufficient detail to permit the court to conduct an analysis to reach a determination of any claim of privilege and separate indication of the basis for assertion of privilege for each document.

INTERROGATORIES

INTERROGATORY NO. 1:

Describe YOUR first use of the NIGHT OF THE LIVING DEAD mark as a trademark including the date of first use, the context in which it was used, the geographic location of its use, the medium on which it was first used, and all of other facts supporting YOUR contention that such first use was a use in commerce satisfying the legal requirements of a trademark use.

Answer: No use to date. As clearly identified on the USPTO website, filing is an 'intent to use' application.

INTERROGATORY NO. 2:

IDENTIFY all persons with knowledge concerning the facts RELATING TO YOUR first use of the mark NIGHT OF THE LIVING DEAD as a trademark.

Answer: As stated in Interrogatory 1, above, application is properly based on 'intent to use'.

INTERROGATORY NO. 3:

Describe all of YOUR plans to use the NIGHT OF THE LIVING DEAD mark including the type of products or services to be associated with the NIGHT OF THE LIVING DEAD mark, the geographic scope of YOUR use, the target market of customers to whom the NIGHT OF THE LIVING DEAD mark is directed (i.e., gender, hobbies, activities, etc. of such customers), the channels of trade through which YOUR products or services will be sold, marketed or distributed and any other anticipated use of the NIGHT OF THE LIVING DEAD mark.

Answer: Filmed (now digital) entertainment, to be marketed and distributed to all consumers of filmed (digital entertainment).

INTERROGATORY NO. 4:

Describe in detail the circumstances surrounding Applicant's selection of the NIGHT OF THE LIVING DEAD mark including any research conducted, any searches conducted, the scope of any searches conducted, persons involved in selecting the mark, communications with anyone concerning the selection of the mark, communication seeking consent from anyone to use the mark, other marks considered at the time, and any other facts and circumstances regarding the selection of the NIGHT OF THE LIVING DEAD mark.

Desire to create a work or works based on concepts derived from the old public domain film.

Researched the title on the USPTO website, and basic internet searches.

INTERROGATORY NO. 5:

Describe in detail any conflict, controversy, lawsuits, infringement, cease

and desist letter, opposition, cancellation, and any other challenge, whether currently pending or already resolved, with any third party involving the NIGHT OF THE LIVING DEAD mark.

Answer: Solely opposition actions to Applicant's filing with the USPTO, as readily and publicly available on the USPTO website.

INTERROGATORY NO. 6:

State all facts RELATING TO the circumstances under which YOU first became aware of Opposer's use of the NIGHT OF THE LIVING DEAD marks, including when YOU became aware of such use, how it was being used by Opposer, where YOU saw Opposer's use, and any communications YOU had with Opposer when YOU first became aware of Opposer's use of the NIGHT OF THE

LIVING DEAD marks. ANSWER: After determining, in fact, that the 60's film "NIGHT OF THE LIVING DEAD" is in the public domain, with remakes and sequels by many independent parties, applicant searched the USPTO website for any registered trademarks in the commercial classes Applicant sought to use. There were none.

INTERROGATORY NO. 7:

IDENTIFY each and every channel of trade in which YOU have used the NIGHT OF THE LIVING DEAD mark including IDENTIFYING specifically every retailer, wholesaler, distributor, sales agent or other such person or entity with whom YOU have used the NIGHT OF THE LIVING DEAD mark.

ANSWER: None to date. The application is based on my intent to use mark.

INTERROGATORY NO. 8:

State all facts RELATING TO how Applicant promotes the NIGHT OF THE LIVING DEAD mark, including identifying the specific marketing medium utilized, the geographic area(s) in which such marketing, advertising or promoting occurred, indicate the time period(s) during which such marketing, advertising or promoting was conducted, the specific goods and/or services marketed, advertised or promoted.

ANSWER: To date, I have no commercial use of the Mark for films, motion pictures and the like. I have been in discussions regarding financing and creating works under the Mark with colleagues in the entertainment industry.

INTERROGATORY NO. 9:

State the marketing expenses made by YOU or on YOUR behalf RELATING TO the NIGHT OF THE LIVING DEAD mark, broken-down by goods or services provided, for each month from inception of YOUR use of the NIGHT OF THE LIVING DEAD mark to the present.

ANSWER: None, as there are no films or motion pictures to market.

INTERROGATORY NO. 10:

IDENTIFY in detail all materials relating to the offering of products and/or services bearing the NIGHT OF THE LIVING DEAD mark, including but not limited to, the appearance of the term on printed materials, on the internet, etc.

ANSWER: None, as there are no current offerings.

INTERROGATORY NO. 11

State the unit and dollar sales on a yearly basis of all products and/or services bearing or offered under the NIGHT OF THE LIVING DEAD mark from the date of first use to the present.

ANSWER: None, as there are no current offerings.

INTERROGATORY NO. 12

IDENTIFY all retailers with whom YOU have entered into any agreement to purchase or who have purchased products and/or services which bear or are offered under the NIGHT OF THE LIVING DEAD mark.

ANSWER: None, as there are no current offerings.

INTERROGATORY NO. 13:

IDENTIFY all distributors with whom YOU have entered into any agreement to distribute products and/or services which bear or are offered under the NIGHT OF THE LIVING DEAD mark.

ANSWER: None, as there are no current offerings.

INTERROGATORY NO. 14:

State the dollar amount of YOUR gross sales revenue for NIGHT OF THE LIVING DEAD products and/or services from the date of first use to the present.

ANSWER: None.

INTERROGATORY NO. 15:

State the total number of units of NIGHT OF THE LIVING DEAD products or services sold by YOU from the date of first use to the present.

ANSWER: None, as there are no current offerings.

INTERROGATORY NO. 16:

Identify all Persons Applicant believes has knowledge of facts relevant to any issue in this proceeding and describe the issues upon which Applicant believes each Person has knowledge.

ANSWER: None.

Dated: July 19, 2017

Respectfully Submitted,

By: 

Farah P. Bhatti, Esq.

Michael Meeks, Esq.

Attorney for Opposer

Buchalter Nemer

18400 Von Karman Ave., Suite 800

Irvine, CA 92612

Phone: 949.224.6272

Email: fbhatti@buchalter.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing OPPOSER'S FIRST SET OF INTERROGATORIES TO APPLICANT RUSTY RALPH LEMORANDE were served upon counsel for Applicant on this 19th day of July, 2017, by First Class Mail postage prepaid and via electronic mail to the following:

Rusty Ralph Lemorande
1245 N Crescent Hts Blvd #B
Los Angeles, CA 90046
Lemorande@gmail.com

By: 
Farah P. Bhatti, Esq.

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Image Ten, Inc. Opposer, vs. Rusty Ralph Lemorande, Applicant.	Opposition No. 91233690 Serial No.: 87/090468 REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF OPPOSER'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
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Opposer, Image Ten, Inc. ("Opposer") hereby requests that judicial notice be taken of the following attached documents in support of Opposer's Motion for Summary Judgment filed concurrently herewith pursuant to Federal Rule of Evidence 201:

Exhibit A: *"Night of the Living Dead": Zombies Restored to Their Full Beauty*, New York Times, February 15, 2018.

Exhibit B: Applicant Rusty Lemorande's Application for Registration of NIGHT OF THE LIVING DEAD

Exhibit C: *"George A. Romero, 'Night of the Living Dead' creator, Dies at 77,"* Los Angeles Times, July 16, 2017.

Dated: March 27, 2018

Respectfully Submitted,
IMAGE TEN, INC.

By: /fbhatti/
Farah P. Bhatti, Esq.
Michael L. Meeks, Esq.
Attorneys for Opposer
Buchalter Nemer
18400 Von Karman Ave., Suite 800
Irvine, CA 92612
Phone: 949.224.6272
Email: fbhatti@buchalter.com

EXHIBIT A

MOVIES

'Night of the Living Dead': Zombies Restored to Their Full Beauty

Streaming

By GLENN KENNY FEB. 15, 2018

On Feb. 13, just in time for Valentine's Day, the Criterion Channel on FilmStruck debuted "Night of the Living Dead," George A. Romero's 1968 horror classic. The posting is notable for several reasons.

For one thing, if you stream a lot of video, you know that "Night of the Living Dead" is everywhere. There are three versions, including a colorized one, free to Amazon Prime members. So you may well ask why the FilmStruck/Criterion Channel offering is a big deal. It's because the version appearing on the site is a new restoration from the film's original negative, produced by the Film Foundation (the preservation nonprofit founded by the director Martin Scorsese) and the Museum of Modern Art, which put "Night of the Living Dead" in its permanent collection. The restored film was shown in November 2016 at MoMA and later in repertory and art house theaters all over the country.

For another, this is the second time Criterion has put up a film on the site the same day as its release on physical media, in this case a two-disc Blu-ray on the Criterion Collection label. (The first time this happened was with "Desert Hearts," released and posted last November.)

Some skeptics online who haven't seen the restoration ask "how good can the new version look?" After all, "Living Dead" is one of the original low-budget horror

movies that morphed into a classic. The answer lies in part with just how bad the versions you can watch on Amazon Prime look. There's one with a "Fisher Klingenstein Films" logo before the opening shot. The image is blurry, with the whites far too bright, washed-out and lacking in detail. A "50th Anniversary" edition, touting the movie as "Now Available in 1080p High-Definition-2K HD transfer from a rare film print" may well be as advertised. Yet however "rare" the print from which the version was scanned, it wasn't in very good shape. A lot of scratches and blotches, and overly high contrasts that deepen the blacks into nothingness while distorting the whites. We shall not even speak of the colorized version.

These various iterations exist because the movie's original distributor failed to copyright it. Once it went into the public domain, anyone with a print of the movie could distribute it anywhere, produce video versions, and more, free. The creators of the movie didn't make any money. The Film Foundation and MoMA allowed Image Ten, the original company behind the film, founded by the director, Mr. Romero, the producing brothers Gary and Russell Streiner, and the writer John Russo, among others, to register a copyright for this restoration. And Janus Films and its sister company Criterion licensed the movie from Image Ten. So this is the only edition of the film that yields revenue to all its original creators.

And it does, in fact, look amazing. "Night of the Living Dead" broke new horror ground with its story of a group of strangers trying to work together to fend off a mysterious attack by risen corpses determined to feast on the living. Its influence is felt on just about every zombie movie since. Yes, it was a low-budget picture, but it was made by artists who knew what they were doing.

The restoration doesn't make the movie look slick, but it gets the true, sharp contrasts of the cinematography. This imbues much of the movie with what was then recognized as a documentary-style realism, which bolsters the emotional power of the tale. When I interviewed Mr. Romero about the restoration, he said, with affection in his voice: "The movie's pimples do show. There's a copy of the script visible in one of the frames! I won't tell where. It will be a little challenge for the fans to spot it."

On a recent viewing of the restoration, I was able to spot it — although for a while I didn't think I would, so engrossed was I, even after probably dozens of viewings. I won't reveal its exact whereabouts, except to say it's after the movie's 75-minute mark.

And the FilmStruck/Criterion Channel presentation also offers some supplements that are on the Blu-ray package. There's a nearly half-hour video featuring the filmmakers Frank Darabont, Guillermo del Toro and Robert Rodriguez, expounding on the movie's influence. You can also watch "Night of Anubis," a 16-millimeter "work print" of "Living Dead" under a different title. It's raggedy looking and only minimally different in content to the finished film, but it's of interest to fans who want to peer into the filmmakers' process; Russell Streiner, one of the film's producers, who also plays the memorable role of Johnny, who has the car keys, gives a thorough introduction to the supplement.

So yes — the FilmStruck/Criterion Channel "Night of the Living Dead" is the one to see. And it is, in the parlance of Criterion, "director approved" — Mr. Romero, who died in July 2017, did sign off on this version. You will not be disappointed to see the movie as he intended.

MY STREAMING COLUMN of Feb. 4 — about the films of this year's Academy Awards nominees for best actor and best actress — regrettably omitted Denzel Washington, nominated for best actor for his work in the legal drama/character study "Roman J. Israel, Esq." Of course Mr. Washington is, like his fellow nominees Meryl Streep and Daniel Day-Lewis, a human landmark of cinema. He is also a two-time Oscar winner, first in the supporting category for "Glory" (1989) and then in the lead actor category for the 2001 police drama "Training Day." You can catch "Training Day" on Netflix, which also features his excellent work in Spike Lee's offbeat 2006 thriller, "Inside Man." Amazon offers a lot more of his films, in blockbuster and award-level modes. He's an actor who is equally satisfying in both. For blockbusters, the 2016 remake of "The Magnificent Seven" is free for Prime members. Oscar-worthy turns include his work as an alcoholic pilot in "Flight" (2012), for which he was nominated; as an initially bigoted lawyer in "Philadelphia" (1993), and as a novice detective in the 1995 film noir "Devil in a Blue Dress." Amazon has all these films for rent or purchase.

A version of this article appears in print on February 18, 2018, on Page AR14 of the New York edition with the headline: George Romero's Vintage Zombies Are Resurrected.

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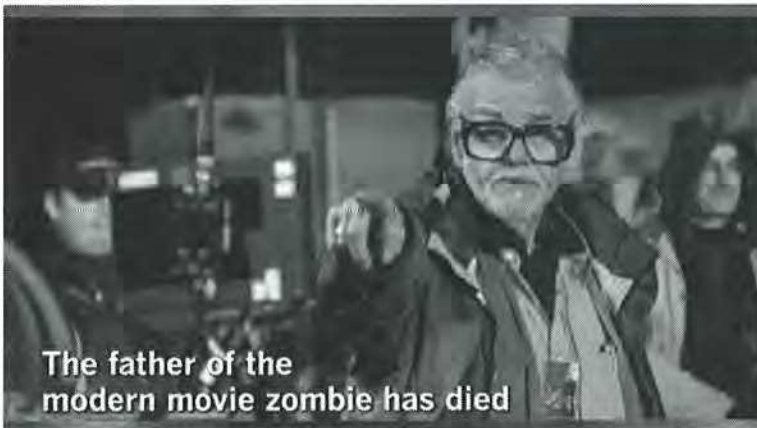
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MOVIES

George A. Romero, 'Night of the Living Dead' creator, dies at 77

By TRE'VELL ANDERSON JUL 17, 2017 1:16 PM

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The father of the modern movie zombie has died

The father of the modern movie zombie has died. (July 17, 2017)

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FOR THE RECORD

JUL 19, 2017 1:16 PM

An earlier version of this story incorrectly stated that George A. Romero's oldest son, Cam, was from Romero's earlier marriage to Christine Romero. Cam, whose full name is George Cameron, is from Romero's first marriage, to Nancy Romero.

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MAR 19, 2017

It was the night of April 4, 1968, and George A. Romero was driving to New York City from Pittsburgh on a mission: In the days to come he was to meet with film studios in hopes that one might buy the horror film he was lugging in his trunk, "Night of the Flesh Eaters."

None of the studios was interested, but Romero still managed to get his \$114,000 film in front of audiences that year. And though critics panned the picture, retitled "Night of the Living Dead," moviegoers were mesmerized — packing theaters, hitting the drive-ins in droves and making Romero the father of the modern movie zombie. Romero's "Living Dead" franchise went on to create a subgenre of horror movie whose influence across the decades has endured, seen in movies like "The Purge" and TV shows like "The Walking Dead."

Romero died Sunday in his sleep after a "brief but aggressive battle with lung cancer," according to a family statement to The Times provided by his longtime producing partner, Peter Grunwald. He was 77.

Romero died while listening to the score of one his favorite films, 1952's "The Quiet Man," with his wife, Suzanne Desrocher Romero, and daughter, Tina Romero, at his side, the family said.

Romero will be remembered best for co-writing (with John A. Russo) and directing "Night of the Living Dead," which showed later generations of filmmakers such as Tobe Hooper and John Carpenter that generating big scares didn't require big budgets. "Living Dead" spawned an entire school of zombie knockoffs, and Romero's own sequels were 1978's "Dawn of the Dead," 1985's "Day of the Dead," 2005's "Land of the Dead," 2007's "Diary of the Dead" and 2009's "George A. Romero's Survival of the Dead."

To get that first film made, however, Romero turned to a resourceful team of Pittsburgh TV-commercial producers. For distribution, the rookie filmmaker turned to the Walter Reade Organization, the parent of Continental Releasing, which specialized in artsy movies like John Cassavetes' "Faces." The director and his team got 14 prints made, handled their own promotion and opened the picture at 14 local theaters. They financed a world premiere on Halloween night.

Most critics trashed the movie, with Daily Variety citing "unrelieved sadism ... which casts serious aspersions on the integrity of its makers." But audiences loved it, and drive-in operators took out newspaper ads to apologize for turning away so many customers.

Romero once told The Times that he was surprised at critics' reactions; he said Roger Ebert's review all but called "Living Dead" a movie spawned by the devil.

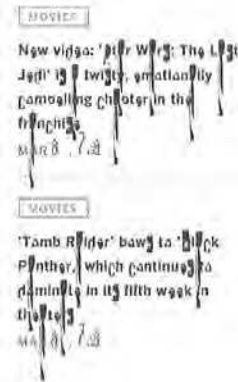
Over time, however, fans have pointed out that, setting aside the graphic violence that made Romero's work so distinct, there were sociopolitical messages that made his movies noteworthy, starting with the casting of that first "Living Dead" picture.

"I think the reason it got noticed was the fact that we used an African American actor in a role that didn't need to be played by an African American actor, and then he gets gunned down by this posse," Romero said, noting that the role was originally written for a white man. On the night of that drive to New York City, he said, "we heard on the radio that [the Rev. Martin Luther] King had been assassinated. So now all of a sudden the power of the film was ratcheted up that much more."

"Living Dead" went on to gross upward of \$50 million.

"He took the image of the zombie, which up to that point was rooted in the Caribbean and part of a black Caribbean culture, and turned it into a metaphor for all sorts of things in American culture," said Leo Braudy, a USC professor who last year published "Haunted: On Ghosts, Witches, Vampires, Zombies, and Other Monsters of the Natural and Supernatural Worlds."

Up to this point, Braudy said, horror movies focused on individuals like Frankenstein's monster, Dr. Jekyll and Mr. Hyde. "The zombie is unique because it's part of a group representing the potential threat of a mass mind," he said.



Romero solidified his reputation as a master of the genre with the sequel "Dawn of the Dead," which premiered in the U.S. in 1979 and became one of the most profitable independent productions in film history. The franchise would eventually encompass six films — the first four, released decades apart, are one storyline.

"'Night of the Living Dead,' then 'Dawn of the Dead' is a few weeks later, 'Day of the Dead' months later and 'Land of the Dead' is three years later," Romero said. "Each one spoke about a different decade and was stylistically different. After 'Land,' I wanted to do something about emerging media and citizen journalism."

"Night of the Living Dead" evoked Vietnam-era bloodshed and, with its black male lead trapped in a farmhouse, echoed some of the hysteria in the civil rights era. "Dawn of the Dead" poked fun at soul-deadening consumerism, and "Day of the Dead" addressed ethics in science. In "Land of the Dead," Romero tackled safety and boundaries, showing a community fortifying itself against a murderous horde while its wealthiest citizens keep alive class divisions.

But part of what made Romero's films so distinctive, no doubt, was their unbridled gore, which caused many of the movies to go unrated.

"I just don't shy away from it," he said in a 2010 interview with The Times, noting that "the old DC comic books were very, very graphic before the old Comics Code cleaned them up."

"Hard-core horror fans would like to see more and more of it. It's the fun part. It's the payoff. It's the downhill dip on the roller coaster."

Romero did, however, draw a difference between his gore-for-purpose approach and new movies that he categorized as "torture porn things."

"They're just mean-spirited and Grand Guignol all the way," he said referencing an infamous Parisian theater that specialized in naturalistic horror shows. "I don't find any substance underlying it. I like to use horror as allegory."

George Andrew Romero was born in the Bronx in New York City on Feb. 4, 1940. He attended Carnegie Mellon University in Pittsburgh, graduating in 1961 from the university's College of Fine Arts. He stayed in Pittsburgh for much of his feature film career.

In the years immediately after "Night of the Living Dead," he made films that were less popular, including 1971's "There's Always Vanilla," 1973's "The Crazies" and 1978's "Martin."

Between other "Dead" films he directed the 1981 film "Knightriders," starring Ed Harris; the 1988 movie "Monkey Shines," his first studio-produced film, which introduced him to Grunwald; and "Two Evil Eyes," a 1990 horror film he made with Italian filmmaker Dario Argento inspired by Edgar Allan Poe short stories. His last credit as a writer was for his characters' appearance in 2017's "Day of the Dead" from director Hèctor Hernández Vicens.

The movies and TV shows that have taken their cues from Romero's work — "World War Z," "28 Days Later," "Shaun of the Dead" — seem almost too numerous to count. And though the popularity of something like "The Walking Dead" would seem to be a compliment to Romero, he once called that juggernaut "a soap opera with a zombie occasionally."

"I always used the zombie as a character for satire or a political criticism, and I find that missing in what's happening now," he said in 2013.

But therein lies what set Romero apart, Braudy said.

"He remained true to his outside Hollywood roots," he said, calling the filmmaker a "tremendous influence on the independent film industry because he didn't have to be in Hollywood to make films that attracted wide audiences. He continues to be a lasting example of the idea that Hollywood needs to be reenergized from outside, independent perspectives."

Romero is survived by his wife; older son George Cameron Romero, from his marriage to Nancy Romero; and son Andrew Romero and daughter Tina Romero, from his marriage to Christine Romero.

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UPDATES:

7:25 p.m.: This story was updated with additional reaction to Romero's death, as well as comments about his legacy.

2:45 p.m. This story was updated with biographical information and quotes from Romero over the years.

This article was originally published at 2:05 p.m.

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Trevell Anderson

ONLINE



Trevell Anderson is a film reporter with the Los Angeles Times covering the intersections of diversity and Hollywood with a focus on black and queer film. A sociology graduate from the nation's headquarters for black male excellence, Morehouse College in Atlanta, he also received his master's in journalism from Stanford University. When he's not tweeting through his Twitter addiction you can find him jamming to Fantasia's latest album or indulging his inner Southern belle with food that reminds him of home, Charleston, S.C.

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